

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

FRANKLIN L. ESAU, JR.,)

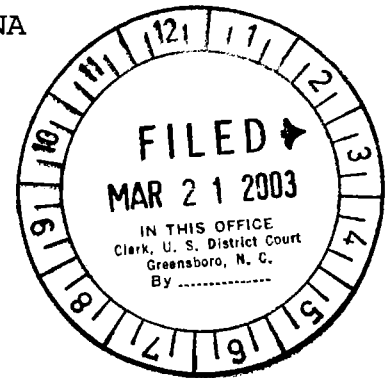
Plaintiff,)

v.)

1:02CV00147

HELEN VICTOR, Internal Revenue)
Service, Memphis Customer)
Service Center,)
BETSY KINTER, Department of the)
Treasury,)

Defendants.)



MEMORANDUM OPINION

OSTEEN, District Judge

Plaintiff Franklin L. Esau, Jr. instituted this action in dispute of actions taken to collect federal taxes from him. The matter is now before the court on the United States' uncontested motion to dismiss for want of subject matter jurisdiction. For the reasons discussed below, this motion will be granted.

I. PROCEDURAL BACKGROUND

Plaintiff Franklin L. Esau, Jr., acting pro se, filed a one-page handwritten complaint alleging generally that United States Internal Revenue Service ("IRS") Agents Betsy Kinter, Helen Victor, and other unnamed agents, imposed a "criminal and illegal levy" against him, altered his tax return, and in so doing,

harassed and intimidated him. Nowhere in his complaint does Esau say what year's or years' tax liability his allegations relate to, or whether his allegations relate to income tax or some other tax. The complaint is likewise silent as to what law or laws the cause of action arises under. Esau seeks restraint of the enforcement of all levies and penalties against him, recovery of unspecified taxes already paid, compensation for various expenditures he made to defend against the levies, and compensation for his mental and emotional strain.

Attached to the complaint is a handwritten cover sheet which captions defendants as Betsy Kinter and Helen Victor. The day he filed the complaint, Esau also caused the clerk of this court to issue four summonses (to the IRS, Betsy Kinter at the Department of the Treasury, the United States Attorney for the Middle District of North Carolina, and the United States Attorney General), on each of which he captioned the sole defendant as the United States of America. Esau, like all civil plaintiffs, was also required by the clerk's office to complete a Civil Cover Sheet form, on which he lists the IRS as the sole defendant.

The United States filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for want of subject matter jurisdiction and a supporting memorandum (each with attached certificates of service). This is the motion now before

the court. Within days, the clerk of court, following the court's standard procedure for notifying pro se parties of their right to respond to dispositive motions, sent a letter to Esau informing him that a motion to dismiss had been filed and that a failure to respond could "cause the court to conclude that the defendant(s)' contentions are undisputed and/or that you no longer wish to pursue the matter," which would likely result in dismissal of the action.

Esau then filed a document by which he sought to respond to the motion to dismiss. This court ordered that document stricken from the record because it lacked a proper case caption and a proper certificate of service. Although the order stated that the document was stricken "without prejudice to the filing of a proper document(s)," Esau has not filed anything further with the court.

II. DISCUSSION

A. Proper Defendants

As an initial matter, the court must identify the intended defendants. Esau's pleadings leave considerable doubt as to his intentions. The complaint itself states that Betsy Kinter and Helen Victor are intended defendants, and the court will treat them as such. Esau does not state whether he is suing Kinter and Victor, both federal employees, in their individual or official

capacities, so the court, mindful of its duty to pro se plaintiffs,¹ will consider Kinter and Victor as defendants in both their individual and official capacities.

As to Kinter and Victor in their individual capacities, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 817, 102 S. Ct. 2727 (1982). Though the court must accept as true all material factual allegations in the complaint, the court need not accept a plaintiff's "conclusory allegations regarding the legal effect of the facts alleged." Labram v. Havel, 43 F.3d 918, 921 (4th Cir. 1995). Esau's complaint does not allege any facts (as opposed to his conclusory allegations) to support the violation by Kinter and Victor of a clearly established statutory or constitutional right, so they are entitled to qualified immunity. See Childress v. Small Bus. Admin., 825 F.2d 1550 (11th Cir. 1987) (citing Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806 (1985)).

¹ Pro se pleadings "must be held to less stringent standards than that of formal pleadings drafted by lawyers." Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285 (1972), 97 S. Ct. 798 (quoting Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594 (1972)).

Accordingly, any claims against Defendants Kinter and Victor in their individual capacities will be dismissed.

Any remaining claims against Kinter and Victor must then be for acts done in their official capacities. A suit against an agency of the United States or its officials for official acts is deemed to be a suit against the United States. Atkinson v. O'Neill, 867 F.2d 589, 589-90 (10th Cir. 1989); Gilbert v. Dagrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). The court will therefore grant the request of the United States to be added as a defendant and consider its motion to dismiss.

B. Subject Matter Jurisdiction

The United States moves that Esau's claims be dismissed under Federal Rule of Civil Procedure 12(b)(1) for want of subject matter jurisdiction. When a defendant's motion to dismiss challenges a federal court's subject matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of proving that such jurisdiction exists. Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). A court should dismiss an action for want of subject matter jurisdiction "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999) (quoting Richmond, Fredericksburg & Potomac R. Co. v. United States, 945 F.2d 765,

768 (4th Cir. 1991)). In ruling on a motion to dismiss for lack of jurisdiction, the court may consider materials beyond the bare pleadings. Evans, 166 F.3d at 647.

Under the principle of sovereign immunity, the United States may not be sued unless federal legislation specifically authorizes the suit. United States Dep't of Energy v. Ohio, 503 U.S. 607, 614, 112 S. Ct. 1627, 1633 (1992); United States v. Shaw, 309 U.S. 495, 500-01, 60 S. Ct. 659 (1940).² Any waiver of sovereign immunity must be strictly construed in favor of the United States. United States Dep't of Energy, 503 U.S. at 614, 112 S. Ct. at 1633. Such waiver cannot be implied and must be unequivocally expressed. United States v. King, 395 U.S. 1, 4, 89 S. Ct. 1501 (1969). Plaintiffs bear the burden of showing an unequivocal waiver of sovereign immunity. See Baker v. United States, 817 F.2d 560, 562 (9th Cir. 1987). Absent such express waiver, the United States is immune from suit under the doctrine of sovereign immunity. United States Auto. Ass'n v. United States, 105 F.3d 185, 186 (4th Cir. 1997).

² As discussed above, suit against an agency of the United States or its officials for official acts is also barred by sovereign immunity because such a suit is deemed to be a suit against the United States. Atkinson v. O'Neill, 867 F.2d 589, 589-90 (10th Cir. 1989); Gilbert v. Dagrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). Therefore, this sovereign immunity analysis applies with equal force to claims against Kinter and Victor in their official capacities.

In this case, Esau has not provided an argument for statutory waiver of sovereign immunity. Even with pro se pleadings, a court has no duty to re-write a plaintiff's complaint for him in the face of a motion to dismiss. See Peterson v. Atlanta Hous. Auth., 998 F.2d 904 (11th Cir. 1993). Under the most generous interpretation, Esau's vague and conclusory complaint tells the court only that he has suffered harm from the IRS's wrongful levy against his assets and wrongful alteration of his federal tax return. Esau cites no statutory authority in support of his cause of action. The complaint lacks sufficient information to even identify Esau's cause of action or to assert the express waiver of sovereign immunity necessary for Esau to overcome the United States' motion to dismiss. Accordingly, the court will grant the United States' motion to dismiss under Rule 12(b)(1).

C. Local Rule 7.3(k)


The court notes, as further and independent grounds for dismissal, Esau's failure to comply with Rule 7.3(k) of the Local Rules for the Middle District of North Carolina, which provides that an unresponded-to-motion may be considered as uncontested. Esau was on notice of the filing of the United States' motion to dismiss, the time period for response, and the potential consequences of his failure to respond. When this court ordered

Esau's attempted response stricken, it expressly did so without prejudice to Esau's filing of a response in proper form. To date, Esau has failed to file anything further. Although the court's decision is not based on Local Rule 7.3(k), the court finds that Esau's failure to contest the United States' motion supports the decision to grant the motion.

III. CONCLUSION

For the foregoing reasons, all claims against the individual defendants will be dismissed, the United States will be added as a defendant, and its uncontested motion to dismiss will be granted. An order and judgment consistent with this memorandum opinion shall issue this same day.

This the 21 day of March 2003.



United States District Judge